IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, a Federally Chartered Corporation, *Appellant*

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees*

On Appeal from the Supreme Court for the State of Alaska

REPLY BRIEF FOR APPELLANT

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CITATIONS

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REPLY BRIEF FOR APPELLANT

One week prior to the second oral argument of this case in the Supreme Court of the United States, the State of Alaska has filed a brief in which it concedes on most of the arguments which it has strenuously advanced against Metlakatla throughout the long course of this litigation and in which it, in effect, repudiates the decision of its own Supreme Court.

In its brief before this Court the State has now agreed:

(1) that Congress had the power to establish the Metlakatla Reservation and that the Act of 1891 is, therefore, valid (see Alaska Br. 39);

(2) that the Reservation could and did continue to exist past the time of Alaska's admission to the Union without violating the equal footing doctrine (see Alaska Br. 39, 44);[1] and

(3) that the Metlakatla fishing right established under the 1891 Act "can reasonably be termed a 'native fishing right' within the meaning of Sec. 4 of the Statehood Act" and has thus been explicitly preserved by the Statehood Act (see Alaska Br. 39).

Having retreated so far, the State's sole remaining argument is that Metlakatla's fishing right, namely an exclusive fishing reserve, is subject to State regulation. The State's regulatory power, under this new theory, does not arise out of any Constitutional inhibition on the Federal Government to exclude State regulation, for appellees admit that "[i]t is clearly within the power of the Federal Government to create Indian reservations within a state or territory which will be free from all local regulatory authority". Alaska Br. 39. What appellees now suggest is that Congress has acted to permit such regulation. Alaska Br. 41, 45.

It is respectfully submitted that the State's new legal position is as much without merit as its old one

[1] Of the Alaska Supreme Court's holding to the contrary, appellees now say: "It is not necessary to draw such a forceful conclusion". Alaska Br. 44.

was. Significantly, appellees' brief does not cite or discuss any specific Congressional action which might tend to bolster its contentions. Instead it speaks vaguely of the "decision of the federal authorities . . . to have the fishing within the reserve regulated under a uniform system of regulation". Alaska Br. 45. Where, how and by whom this "decision" was made is not specified.

Appellees' inability to point to any specific action of Congress to support its contention that the Metlakatla fishery is now under State regulation is, of course, due to the fact that there is none. The fact is that Congress took the very opposite position. In the statutes which created and preserved Metlakatla's rights, Congress most emphatically reserved to the Federal government the power of regulation. None of these relevant provisions of law, it should be noted, are discussed in appellees' brief. Indeed, appellees have studiously avoided mention of the regulatory clauses in three crucial statutes:

(1) The Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. 358, which sets apart the Annette Islands for the Metlakatlans

> "to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

(2) The Act granting Alaska jurisdiction over crimes committed on Indian Reservations, Pub. L. 280, 83rd Cong. 67 Stat. 588, as amended, 72 Stat. 545, 18 U.S.C. 1162(a), which provides that

> "Nothing in this section shall . . . deprive any Indian . . . community of any right, privilege,

> or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."[2]

(3) Section 4, Alaska Statehood Act, 72 Stat. 339, which provides that native rights (including fishing rights)

> "shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority. . . ."

Rather than attempting to explain these specific reservations of Federal regulatory authority, appellees speak vaguely of an allegedly traditional Congressional policy of effecting a "uniform scheme of fisheries regulation." Alaska Br. 42. Closer scrutiny of the relevant background reveals that this "policy" is based upon nothing more than the historical accident that (1) during the period of Alaska's Territorial status responsibility for non-Indian fishing in the area was vested in the Federal rather than the Territorial government, and (2) the Federal government is the authority which traditionally controls all Indian fishing rights. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268. As power was thus fused, a single sovereign controlled all of Alaska's fishery during the Territorial period. But that never meant that complete uniformity was established. As Cohen points out "[i]n many conservation statutes the [Alaska] natives are given special privileges". *Id.* 408. See also discussion of

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[2] This statute has been held to continue the prohibition of State regulation of Indian hunting and fishing on Indian Reservations to which the provisions of Public Law 280, 83rd Cong. have been extended. *Klamath & Modoc Tribes* v. *Maison*, 139 F. Supp. 634 (D. Ore., 1956).

Alaska native hunting and fishing rights in COHEN, *op. cit.* 407-409.

If Congress had wanted to accomplish what appellees suggest, namely to protect the Metlakatla Fishery Reserve against invasion by private fishermen but permit the entry of the State for purposes of regulation, it would have done so through the Alaska Statehood Act. Yet neither the wording of that statute nor its legislative history support such a theory.

If all that Congress had intended to do with regard to Metlakatla is preserve the exclusive character of the Reserve, it would surely not have reserved to itself the sweeping and all-encompassing powers which the phrase "absolute jurisdiction and control" implies. That phrase, it must be remembered, was previously used in the Indian disclaimer clauses of other Statehood Acts. These clauses have invariably been held to exclude State jurisdiction. See Metlakatla Br. 50-51. When Congress included the traditional Indian disclaimer clause in the Statehood Act and explicitly added the term "fishing rights," it undoubtedly recognized that the State could easily regulate a fishing right out of existence and that the natives were thus in need of protection against State regulation.[3]

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[3] Just as the anti-fishtrap regulation would destroy Metlakatla's cannery, unrealistic opening and closing dates set under Alaska regulations could destroy all of Metlakatla's fishing. The Secretary of the Interior was well aware of this possibility when he adopted Alaska's opening and closing dates as part of his own regulations. With regard to the Clarence Strait District, which includes the Metalakatla Reserve, he stipulated that its opening and closing dates *must* harmonize with those in the General Section of the Southern District. 25 C.F.R. § 88.2(d). Thus Metlakatla cannot be singled out by the State for punitive restrictions.

Nor does the legislative history of the Statehood Act leave any doubt about the intent of Congress to exclude State regulation. Congress has made it wholly clear that the purpose of Section 4 is

> "to protect the natives of Alaska against the possibility of infringement of their property rights by the proposed new state" (H.R. REP. No. 1731, 80th Cong. 2d Sess. 31 (1948));
>
> to "except" from transfer to the State those "fisheries and wildlife . . . which are . . . included within the reserved native rights" (S.REP. No. 1929, 81st Cong., 2d Sess. 1-2 (1950));
>
> "to maintain unimpaired the authority of Congress over the *use and disposition* of native property in Alaska"; (H.R. REP. No. 255, 81st Cong., 1st Sess. 13 (1949)) (emphasis supplied); and
>
> to emphasize that "[t]he right of the Federal Government *to legislate with respect to natives* is not impaired by the bill and cannot be impaired by the State Constitution." S.REP. 315, 82nd Cong., 1st Sess. 2 (1951) (emphasis supplied).

The wording of Section 4 and its predecessors, it must be noted, was hammered out against the background of strong pressure by Indians and Indian-interest organizations for the full protection of native rights. On June 9, 1950, Oliver LaFarge, President of the Association on American Indian Affairs, wrote to Senator Joseph C. O'Mahoney, then Chairman of the Senate Committee on Interior and Insular Affairs:

> "Alaska is our last frontier. There is serious danger, unless the nation take steps to prevent it, that Alaskan frontier development may involve the despoliation of the native and Indian people . . .
>
> The United States must require that Alaska pledge its respect for these commitments of the

> nation in the legislation under which Alaska seeks to enter the Union. Such an expressed commitment would merely confirm existent rights; it would not change them. But the absence of that pledge would be an open invitation to Alaska to disregard the rights of its many thousands of Indians, Aleut, and Eskimo citizens." See Appendix B, pp. 2a-3a.[4]

That such pleas did not go unheeded is demonstrated by the subsequent comment of Senator Clinton P. Anderson, then a member of the Senate Committee on Interior and Insular Affairs and now its Chairman, in a letter to THE NEW YORK TIMES:

> As one who participated in all of the exhaustive hearings and executive sessions which led to a virtual re-writing of the bill by the Committee, I can state categorically that no provision in the entire measure received greater attention, thought, and painstaking care than did the disclaimer clause from which I have just quoted. We had the able technical assistance of Indian experts from the Department of the Interior and the Department of Justice. Careful research was done on the language of similar disclaimer clauses in previous enabling acts and their interpretation by the Courts, as well as in the law and decisions with respect to Alaska. THE NEW YORK TIMES, Sunday, April 11, 1954, p. E 10.

Senator Anderson used the occasion to allude to certain political realities which the authors of the Statehood bill considered in drafting Section 4: "Most of the members of the Committee have strong Indian constituencies . . ." *Ibid.*

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[4] For additional evidence of Indian pressure on Congress in connection with native rights clauses in the Alaska Statehood Act see statement of Delegate Bartlett. 96 Cong. Rec. 11869-80 (1950).

When Congress thus acted to protect native rights against "the possibility of infringement by the new state", it knew of Metlakatla's fish traps (see 96 Cong. Rec. 11879 (1950)) and of Alaska's strong opposition thereto. See e.g., Testimony of Ernest Gruening in *Hearings Before Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs,* 85th Cong., 1st Sess. 306 (1957). It clearly acted with care and deliberation when it insisted that Indian fishing rights remain under the "absolute jurisdiction and control" of the United States.

Added support for appellant's interpretation of Section 4 can, of course, be found in the unequivocal action of the Secretary of the Interior, who has never waivered in his interpretation of Section 4 of the Alaska Statehood Act as excluding State regulation of Indian fishing rights. The authorities for giving the Secretary's interpretation of the statute "considerable weight" are set forth in Metlakatla Br. 31-32.

In their brief, appellees seek to equate lack of State regulation of the Metlakatla fishery with lack of all regulation. Alaska Br. 43-44. They contend that Metlakatla cannot claim the right "to be free of regulation." *Id.* at 42. Metlakatla most certainly does not claim such a right. It has during the entire period since Alaska's accession to Statehood been under Federal regulation and has rigidly adhered to the conservation regulations promulgated by the Secretary of the Interior. These regulations do in fact follow closely the State of Alaska's scheme of regulation, 25 C.F.R. § 88.2 (a), departing from it only to allow a total of 11 Indian fish traps, Id. § 88.2 (e), and to safeguard Metlakatla's Reserve against discriminatory restric-

tions, § 88.2 (d).[5] Competent authorities have asserted that properly regulated fish traps are no greater threat to sound conservation than seine boats and are in fact, far easier to police. See, e.g., Testimony of Warner W. Gardner, Assistant Secretary of the Interior, in *Hearings on S. 1446 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. 7 (1947).

Federal regulation has thus in no way prevented the execution of a comprehensive conservation scheme. The fact that two sovereigns collaborate in enforcing that scheme is in no way unusual. Salmon conservation on the Columbia River and its tributaries, for example, is the responsibility of the States of Oregon, Washington and Idaho. Migratory birds are protected by treaties between Canada and the United States. See *Missouri* v. *Holland*, 252 U.S. 416 (1920).

Cases such as *Ward* v. *Race Horse*, 163 U.S. 504 (1895), *New York* ex rel. *Kennedy* v. *Becker*, 241 U.S. 556 (1916), and *Tulee* v. *Washington*, 315 U.S. 681 (1942) have, as appellees correctly point out (Alaska Br. 43), no bearing on this case because they involve off-reservation hunting and fishing rights.[6] In the instant case we are dealing with on-reservation Indian rights which have consistently been protected by the courts against State regulation. See *Klamath & Modoc Tribes* v. *Maison*, 139 F. Supp. 634 (D. Ore., 1956).

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[5] See Fn. 3, *supra*, p. 5.

[6] The force of the *Race Horse* case has been substantially reduced by *United States* v. *Winans*, 198 U.S. 371 (1905), and *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919). See discussion of these cases in *State* v. *Arthur*, 74 Ida. 251, 261 P. 2d 135, 138-139, cert. den. 347 U.S. 937 (1954).

One added reason cited by the State in support of its contention that State regulation of the Metlakatla Fishery Reserve is permitted is that "[Metlakatla] is not, and has never been treated as what is normally termed an Indian reservation." Alaska Br. 44. Even if this statement as to the treatment of the Reserve were true, it would have no bearing on the applicable law, in view of the fact that Congress has, as has just been shown, explicitly reserved to itself jurisdiction over Indian fishing rights in Alaska. But the fact is that appellees' statement is not true. That statement as well as similar assertions in the opinions below[7] are evidently founded on a lack of knowledge by the Alaska bench and bar of the true facts concerning Indian reservations in the lower 48 states.

Appellees and the Alaska courts seem to have fallen victim to certain romantic notions of Indian reservations, commonly held in the Eastern United States. Indians are pictured as still living wholly apart from the rest of the population, following their ancient traditions and perhaps even wearing aboriginal dress, preferably including war bonnets. Alaska's natives, appellees say, do not live that way, and are therefore "different".

The fact is that to anyone familiar with American Indian affairs, the Metlakatla Reservation will appear very similar to many of the reservations of the Western United States. As the Circuit Court of Appeals for the Ninth Circuit[8] observed in *Alaska* v. *Annette Island*

[7] See also *United States* v. *Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958).

[8] That Court truly was in a position to make an expert comparison between Alaska Indians and other American Indians. As the ninth circuit then covered Arizona, Nevada, California,

Packing Co., 289 F. 671 (9th Cir., 1923), cert. den. 263 U.S. 708 (1923):

> There can be no question therefore but that the Metlakahtla Indians are wards of the government. They are dwelling on the island at the sufferance of the government and on land which belongs to the United States. The purposes sought to be accomplished by the government are the same as its purposes for all Indian reservations, to encourage, assist, and protect the Indians in their efforts to acquire habits of industry, become self-supporting, and advance in the ways of civilized life. At 674.

That the Court of Appeals was fully justified in drawing this parallel and would be even more justified if it drew it today can be demonstrated by analysis of the points cited by appellees as distinguishing Alaska Indians from other American Indians. The fact is that there is nothing unique about the Alaska Indians' right to vote, see *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948); *Trujillo* v. *Garley* (U.S. D.Ct. for D. N.M., Aug. 11, 1948, unreported), nor about their ability to be elected to high office.[9] Nor is it unusual for an Indian reservation to contain a group of one particular ethnic stock joined with Indians of different ethnic origin,[10] or to see a State authority grant welfare

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Oregon, Washington, Idaho and Montana, about half of the Indian country of the lower 48 states was under the Court's judicial supervision.

[9] A Rosebud Sioux, Benjamin Reifel, now represents the first district of South Dakota in the United States House of Representatives. CONGRESSIONAL DIRECTORY, 1961 Ed., 150-151. No one has suggested that this gives the State of Dakota the power to regulate Indian hunting on the Rosebud Sioux Reservation.

[10] See *e.g.*, 18 Stat. 28, 43 Stat. 246.

assistance to reservation Indians.[11] Furthermore, appellees' statement that Metlakatla has "no tribal organization" is based on the misconception that to be tribal an Indian governmental organization must still exist in its aboriginal form. That Indian communities have often taken on new governmental forms, organized not along aboriginal, ethnologically homogeneous lines but along modern, political ones is pointed out in COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268, see also 126 ff. Finally, appellees' assertion that the schools in the area are furnished by the State is wholly misleading. The State of Alaska has never furnished schooling to the Metlakatla Indian Community except when Federally assisted. Like many other Western states it has assumed responsibility for the operation of Indian schools only after being assured of a Federal subsidy under the program for impacted-areas aid to education. See 20 U.S.C. 645. It has consistently received such a subsidy for the education of Metlakatla children for no other reason but that they lived on an Indian reservation. See Appendix C, p. 3a.[12]

CONCLUSION

As has heretofore been pointed out, the impact of Metlakatla's fish traps on the total economy of Alaska is insignificant. Yet to Metlakatla's economic existence they are vital. Congress and the Secretary of the Interior weighed the relevant economic factors and decided to continue Federal jurisdiction over Metlakatla's

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[11] *Acosta* v. *San Diego County*, 272 P. 2d 92 (Cal. App., 1954).

[12] The annual Federal subsidy for Metlakatla children for the last three years has amounted to from $443 to $492 per child, sums which compare favorably with nation-wide norms.

rights. Appellant is here to ask this Court to protect the rights which the legislative and executive branches of the Federal government have granted it.

Respectfully submitted,

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& MCLAUGHLIN

December 12, 1961

APPENDIX B

COPY

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.
48 East 86th Street
New York 28, New York

June 9, 1950

The Honorable Joseph C. O'Mahoney
United States Senate
Washington, D. C.

Dear Senator O'Mahoney:

It is our understanding that the Senate Committee on Interior and Insular Affairs plans to take final action on the Alaska Statehood Bill, H. R. 331, on Monday, June 12, or during that week.

The rights, and in fact the destiny, of the native and Indian people of Alaska are at stake in the Senate decisions to be made, since the Committee, according to its Print on this bill, is considering amendments which eliminate all guaranties of the property rights of these people.

It is our confirmed judgment that an Alaska Statehood Bill without such guaranties will put all native land rights in Alaska in jeopardy. The history of Indian land protection in the United States supports that view.

Prior to the policy of statehood guaranties of native rights, the fraud and violence committed against Indians on the American frontier became known as a "Century of Dishonor." Solemn Federal promises to respect Indian possessions were again and again violated or forgotten as soon as the Federal authority over territories was withdrawn. The State of Georgia openly defied the United States Supreme Court to carry out its decisions upholding Indian land rights in Georgia under Federal treaties. In other States, as, for example, in Kansas and Missouri, In-

dian restricted lands were rapidly alienated through forced sales to meet high state-imposed taxes. The United States Supreme Court later declared these taxes invalid, but the damage had been done. Indians of Georgia, Texas, Kansas, and Missouri, are still waiting for redress for wrongs suffered at the hands of those States in the 1830's and 1850's.

About 70 years ago, when the public conscience had been deeply aroused, Congress adopted a new policy to ensure respect for Federal promises to our Indian tribes. It is now an honored American tradition that a new State, seeking admission to the Union, must pledge its respect for the land rights and all other rights of native communities within its borders. Every State admitted since the 1870's—Montana, North Dakota, South Dakota, Washington, Idaho, Wyoming, Utah, Oklahoma, Arizona, and New Mexico—willingly gave that pledge. Hawaii offers a similar pledge today in another statehood bill now before the Senate Committee. These pledges have been honored, and the Indians in those states have had a measure of security in their lands and possessions unknown to their kinsmen in other areas in earlier years.

Alaska is our last frontier. There is serious danger, unless the nation takes steps to prevent it, that Alaskan frontier development may involve the despoliation of the native and Indian people. The United States guaranteed in the Russian Cession Treaty of 1867 that these natives and Indians would be protected in their property. In the First Alaskan Organic Act of May 17, 1884, Congress made the pledge more specific, and promised that within the Territory of Alaska all Indians and Eskimos would be protected "in the possession of any lands actually in their use or occupation or now claimed by them." This pledge was repeated and amplified in the Act of March 3, 1891 and the Alaska Act of May 1, 1936. The Supreme Court of the United States has confirmed these commitments and again and again, as in the recent Karluk case, which this

Association helped carry to a successful conclusion, has had to intervene to protect Alaskan native possessory rights.

The United States must require that Alaska pledge its respect for these commitments of the nation in the legislation under which Alaska seeks to enter the Union. Such an expressed commitment would merely confirm existent rights; it would not change them. But the absence of that pledge would be an open invitation to Alaska to disregard the rights of its many thousands of Indian, Aleut, and Eskimo citizens.

We feel sure all Americans of good will join us in appealing to you to require in the Alaska Statehood Bill now before you a strong pledge protecting the land rights of natives and Indians on our last frontier.

Sincerely yours,

OLIVER LA FARGE,
President

OLF/D

APPENDIX C

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON 25, D. C.

December 8, 1961

Mr. Richard Schifter
Room 300
1700 K Street, N. W.
Washington 6, D. C.

Dear Mr. Schifter:

This letter will provide the information you requested by telephone on December 7, 1961, regarding Federal pay-

ment under Public Laws 874 and 815 to the State of Alaska for the children connected with the Annette Island Reserve located at Annette Island.

The organized school districts in Alaska each submit their applications and receive their Federal entitlement as provided under these two public laws. As you know, a large part of Alaska is unorganized territory and not in any school district. For the purposes of Public Laws 815 and 874, the entire unorganized territory is considered as one school district administered by the State Department of Education acting in the nature of a local school board. The State Department of Education prepares the application under each law listing all of the Federal properties located in the unorganized territory and the children connected with each property. The Federal entitlement under this over-all project is paid to the State Department and used by it together with other State and local funds to finance the operations of public schools located in the unorganized territory.

Applications submitted under Public Law 874 must list each Federal property claimed as a basis for Federal entitlement and the number of school children on each Federal property and also the number who live in a taxable home with a parent employed on each Federal property. The Federal entitlement, however, is computed on the basis of the average daily attendance during the school year of all federally connected children in the school district. It is not computed separately for the children connected with each property. Thus, the Federal entitlement a school district receives for children connected with one Federal property when it claims more than one property as the basis for its Federal entitlement must be on a derived or estimated basis. We have estimated the Federal entitlement paid to the State of Alaska for the children who live on the Annette Island Reserve in the following manner: Determined the percent that the number of children living

on Annette Island Reserve is of the total number of children living on Federal property claimed by the Alaska State Department of Education under the project application each year. This percentage, then, is applied to the total entitlement paid this school district for all children claimed in the application who live on Federal property.

The figures presented below show the total entitlement to the State Department of Education for the unorganized territory application for the years 1959-60-61 (fiscal years) and the estimated amount of that entitlement attributable to the children residing on Annette Island Reserve. In 1959 a total of $3,500,466.57 was paid to the State of Alaska under this application. The 300 school children who lived on Annette Island Reserve were .0299% of the 10,010 children living on Federal property in the unorganized territory. This yields an estimated entitlement for the average daily attendance of these 300 children of $104,663.64 at a rate of $443.49 per child. In 1960 a total of $4,217,936.88 was paid to the State of Alaska and the 244 children living on the Annette Island Reserve were .0231% of the 10,542 children living on Federal property in the unorganized territory. This yielded an estimated entitlement for these children of $97,610.04 at a rate of $492.98 per child. In 1961 the entitlement paid to the State of Alaska for this purpose was $4,972,488.36 and the 246 children on the Reserve constituted .018% of the 13,616 children living on Federal property in the unorganized territory. This yielded an estimated entitlement for the Annette Island Reserve children of $89,045.40 at a rate of $468.66 per child.

In 1957 the Alaska State Department of Education allocated part of the entitlement it received under Public Law 815 for increases in federally connected children in the unorganized territory for the period June 30, 1956 to June 30, 1958 to construct a six classroom school building with necessary auxiliary facilities on Annette Island at a cost

in Federal funds of $298,472. Nonfederal funds provided the equipment for this building.

I hope this information will be helpful to you.

Sincerely yours,

B. ALDEN LILLYWHITE
B. Alden Lillywhite
Associate Director for
Federally Affected Areas